Editor's note: 97 I.D. 137

JASE O. NORSWORTHY ET AL.

IBLA 88-65 Decided April 17, 1990

Appeals from decisions of the Montana State Office, Bureau of Land Management, cancelling overriding royalty interests and requiring repay-ment of overriding royalties. M-32324(ND) et al.

Decisions reversed; requests for attorneys' fees denied.

1. Administrative Procedure: Generally--Appeals: Generally--Rules of Practice: Appeals: Failure to Appeal

   Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

2. Administrative Procedure: Generally--Appeals: Generally--Notice: Generally--Rules of Practice: Appeals: Failure to Appeal

   Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

3. Oil and Gas Leases: Applications: Sole Party in Interest

Where the record establishes that a firm filed DEC's prepared and signed by its employees, and that the employee/applicants were required by verbal agreement, as a condition of their employment, to sell their leases to parties as directed by the firm, the firm had a claim to an advantage or benefit from a lease within the meaning of 43 CFR 3100.0-5 (1978). Thus, the firm held an "interest" in its employees' DEC's, and, where that interest was not disclosed at the time the DEC's were filed as required by 43 CFR 3102.7 (1978), they should have been rejected.

4. Oil and Gas Leases: Applications: Sole Party in Interest

Where the record fails to show that there was any enforceable agreement between a lease filing firm and nonemployees under which the nonemployees were bound to transfer any leases they acquired as directed by the firm and shows instead that the method for acquiring leases developed by the firm rested solely on the fact that the nonemployees enlisted to sign DEC's were friends and relatives of the employees or principals of the firm and, thus, could be expected to sell any subsequently acquired lease to the firm by ties of loyalty, the firm held no "interest" in the DEC's it filed on behalf of the nonemployees, since it had no means to enforce such expectation. Such claims of loyalty amounted merely to a hope or expectancy that a successful applicant would sell the lease to the firm.

5. Oil and Gas Leases: Cancellation--Oil and Gas Leases: Overriding Royalties

Under 43 CFR 3108.3 (1987), BLM lacks the power to administratively cancel any oil and gas lease or interest therein that is in production.

6. Equal Access to Justice Act: Adversary Adjudication--Oil and Gas Leases: Generally

Cancellation of overriding royalty interests in an oil and gas lease and the requirement to repay overriding royalties does not constitute an adversary adjudication under sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. IV 1986), thus entitling the prevailing party on appeal to recover attorneys' fees and expenses.

APPEARANCES: W. H. Bellingham, Esq., Thomas E. Smith, Esq., Billings, Montana, for appellants Jase O. Norsworthy, James W. Reger, A. G. Bowen, Jr., Abbie Reger, Clinch Gray Norsworthy III, Emily Norsworthy, Margaret Norsworthy (Trustee, Norsworthy Family Trust No. 1), Dorothy VanArsdale, Margaret L. Jones, Forest Bowen, Margaret Reger Trust et al., J. R. Reger Trust et al., S. L. Reger Trust et al.; Carolyn S. Ostby, Esq., John E. Bohyer, Esq., Billings, Montana, for appellants Melvin P. Hoiness, June A. Larsen, and Karen A. Rintoul; Doris M. Poppler, Esq., Billings, Montana, for appellants Langdon G. Williams (personally and as trustee), Joyce Williams, and Theodore Williams (trustee); David A. Veeder, Esq., Billings, Montana, for appellant Dennis C. Rehrig; John L. Gallinger, Esq., Billings, Montana, for appellant Donald Jones; Pierre L. Bacheller, Esq., Billings, Montana, for Deborah C. Reger and James R. Reger; Larry G. Grubbs, Esq., and Robert C. Smith, Esq., Billings, Montana, for Dorothy Van Wagoner Lenehan; and Richard K. Aldrich, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Jase O. Norsworthy and others (appellants) have appealed from decisions of the Acting State Director, Montana State Office, Bureau of Land Management (BLM), dated September 11, and October 20, 1987, cancelling their overriding royalty interests in eight noncompetitive oil and gas leases and requiring them to repay any overriding royalties already received by them in connection with those interests.

BACKGROUND

The eight leases involved here arose from the filing of simultaneous oil and gas lease drawing entry cards (DEC's) for eight parcels by vari-ous individuals between August 19, 1975, and December 20, 1977, in simultaneous noncompetitive oil and gas lease drawings conducted by BLM. None of the cards disclosed the existence of other parties in interest, but each instead represented that the applicant was the sole party in interest. Eight leases were issued, effective between November 1, 1975, and March 1, 1978, to the applicants after submission by them of acceptable oil and gas lease offers. 1/

These leases were then assigned from the original lessees either separately to the Patrick Petroleum Corporation of Michigan (PPCM) or, in most cases, jointly to PPCM and the Williams Exploration Company (WEC). As part of these first assignments, the original eight lessees each retained a 1-percent overriding royalty interest in any production from the lease.

Subsequently, overriding royalty interests in these eight leases were assigned back from PPCM and WEC to Jase O. Norsworthy, James W. Reger,

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1/ The winning DEC's were filed by Menno L. Bargen (M-32324 (ND)), June A. Larsen (M-32753 (ND) Acq.), Melvin P. Hoiness (M-32760 (ND) Acq.), June M. Heller (M-34187 (ND) Acq.), Dorothy Van Wagoner (Lenehan) (M-34446 (ND)), Deborah C. Reger (M-34449 (ND) Acq.), James R. Reger (M-37404 (SD)), and Karen A. Rintoul (M-39449).

Since the simultaneous oil and gas lease drawings involved herein, that system for issuing Federal oil and gas leases has been abolished as a result of passage by Congress of section 5102 of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Reform Act), P.L. No. 100-203, 101 Stat. 1330-256 (1987).

Langdon G. Williams, Vincent T. Larsen, or Dennis C. Rehrig (Norsworthy et al.). 2/ Norsworthy et al. were closely associated with the NRG Company (NRG), which was the entity that evidently filed the eight DEC's involved here, as well as hundreds of others, in BLM's simultaneous noncompetitive oil and gas lease drawing system between 1975 and 1980. 3/ Significantly, the eight applicants in these cases were all related in some way to NRG, either through employment or as relatives or friends of NRG principals, employees, or associates.

BLM ruled in its September 1987 decision that NRG had engaged in "multi-filing practices and sole party in interest violations" from January 1975 through February 1980. Although BLM left the leases intact, it cancelled the overriding royalty interests in these leases held by the eight original lessees and by Norsworthy et al., except those held by Larsen. 4/ BLM explained that there was "insufficient evidence to allege [Larsen's] involvement * * * in fraudulent activities." Some of the overriding roy-alty interests originally held by Norsworthy et al. had been reconveyed to others. BLM's October 1987 decision cancelled these interests.

2/ Norsworthy, Reger, Williams, and Larsen received interests in all eight leases. Rehrig received interests in only three.

3/ There is some doubt as to whether NRG completed the DEC's for all of these eight applicants. For example, the DEC of Karen A. Rintoul (M-39449) appears to have been completely filled out, including parcel number, in her handwriting. In view of our holdings herein, it is unnecessary to resolve this question.

4/ BLM evidently left the leases intact under the terms of a settlement agreement executed in June 1985 between the United States and PPCM and WEC, discussed below.

The cancelled overriding royalty interests in each lease are set out in Appendix A.

The eight oil and gas leases involved herein have at all relevant times been considered to be producing leases either due to production from wells drilled in the leased land or as a result of production attributable to the leases under communitization agreements.

The factual basis for BLM's decisions was provided by a criminal investigation, begun in January 1980 in conjunction with the Justice Department, into the activities of PPCM, WEC, and NRG with respect to the acquisition of interests in 63 noncompetitive oil and gas leases (including the 8 leases involved herein) issued by BLM under the simultaneous oil and gas leasing system between January 1975 and February 1980. As a result of that investigation, it was concluded that PPCM and NRG had manipulated the system in order to increase their chances of acquiring oil and gas leases or interests therein, thus violating the Departmental regulations prohibiting multiple filings and requiring disclosure of other parties in interest.

The results of the investigation were submitted to a Federal grand jury, which returned criminal indictments against NRG. 5/ A criminal information was filed against NRG in January 1983, and the criminal proceedings were docketed as United States v. NRG Co., Crim. No. CR-83-1-GF (D. Mont.). In Information, Crim. No. CR-83-1-GF, NRG was accused as follows:

> [Between March and September 1978, NRG] knowingly and willfully and unlawfully did make and cause to be made false,

5/ PPCM was also indicted for similar infractions.

> fictitious and fraudulent statements and representations to the United States Department of the Interior in a material matter; that is, [NRG] prepared, caused to be prepared, filed and caused to be filed Drawing Entry Cards in the names of offerors who were NRG COMPANY employees, which Drawing Entry Cards stated that said offeror was the sole party in interest, which statement [NRG] well knew was false, in that said offeror was not the sole party in interest but that defendant NRG COMPANY possessed an interest in the lease if the offeror's card was selected as the winner. [Emphasis supplied.]

Significantly, the information cited NRG only for criminal acts in connection with the filing of 12 DEC's in the names of offerors who were NRG employees. None of these filings is involved in the present case.

Contemporaneous with the filing of the criminal information, NRG and the U.S. Attorney gave notice to the court of a plea agreement. Under this agreement, NRG agreed only to "plead guilty to each of twelve counts of violation of 18 U.S.C. § 1001 as charged in an Information, Crim. No. CR-83-1-GF." NRG was eventually fined by the district court in accordance with the plea agreement. In this plea agreement, the United States agreed to bring no further criminal charges related to NRG's participation in the simultaneous oil and gas leasing system during the years 1975 to 1980. However, the plea agreement provided that it would not prevent, prejudice, or preclude the right of the United States to pursue civil remedies against NRG or its officers or employees thereof, nor prevent, prejudice, or preclude the right of the Department of the Interior and/ or BLM to pursue administrative remedies against NRG or its officers or employees.

Filed along with the criminal information and plea agreement was an Offer of Proof setting out the factual background of the criminal action.

As BLM relies on this offer of proof as the basis for the decisions under appeal, it is appropriate to set it out in full:

> On December 30, 1974, [PPCM] entered into a joint venture agreement with [WEC], providing for the exploration and acquisition of lands in an area of Montana, North Dakota and South Dakota known generally as the Williston Basin. Under the joint venture agreement [PPCM] and [WEC] shared equally the costs associated with the exploration, acquisition and development of property in the Williston Basin that was thought to have potential oil and gas deposits.
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> Commencing in January 1975, [NRG] was engaged to acquire property in the Williston Basin on behalf of the joint venture. The costs associated with this land acquisition pro-gram were borne equally by [PPCM] and [WEC]. Much of the property acquired by the joint venture consisted of mineral rights purchased from private landowners; in addition, considerable acreage was obtained in the Federal Simultaneous Oil and Gas Leasing Program.
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> From May 1975 to 1979, [PPCM] detailed an employee to Billings, Montana to monitor the joint venture land acquisi-tion program. The [PPCM] employee used an office in the [NRG] offices and was in daily contact with the NRG principals and employees.
>
> The method employed by the [NRG] and [PPCM] in an effort to acquire leases in the Federal Simultaneous Program operated as follows:
>
> [PPCM and WEC] would examine the listing of all federal lands in Montana, South Dakota and North Dakota to be offered for lease in the monthly federal lottery and would notify NRG of the parcels of interest. The NRG office manager would coordinate the filing of drawing entry cards on parcels the joint venture had determined to try to acquire. The office manager arranged to have NRG employees -- clerical and professional -- sign cards in their own names as offeror, and return the cards [to] him. He then inserted the appropriate parcel numbers and date, and filed the cards with the Billings office of the [BLM]. Employees were told that NRG was affording them the opportunity to file lottery cards. The NRG office manager advised the employees that the payment of the ten dollar filing fee per card, and the selection of parcels, would be taken care of by NRG. Employees were told to fill in only their name, address, social security number, and sign the card. Employees were told that if a card bearing their name was drawn as the winner in a monthly lottery, NRG would pay the yearly rental payment. Employees were told that NRG would

purchase a winning lease from them for 25 cents an acre (later raised to 50 cents, then a dollar an acre), together with a 1% overriding royalty on any oil or gas production. Spouses of NRG employees also signed cards on the same terms. Numerous blank cards -- sometimes hundreds at a time -- were provided to NRG employees to be signed. [PPCM's] employee in Billings also signed cards, as did his wife. The NRG principals, Jase O. Norsworthy and James W. Reger, also signed cards, along with their spouses and children. Similarly, their in-laws, relatives, neighbors, business acquaintances, and friends also signed cards. NRG's filing program was explained to these individuals substantially as it was to the NRG employees. NRG paid all filing fees, as well as rental payments on winning leases. NRG was reimbursed by the [PPCM-WEC] joint venture.

In similar fashion, friends, employees and business associates of U.E. Patrick, President of [PPCM], signed cards. The signed cards were transmitted to NRG at Billings, Montana, for designation of parcel numbers, payment of filing fees, and filing.

In this manner, NRG was able to obtain thousands of cards signed in blank by dozens of individuals. These signed cards were kept in a filing cabinet in the NRG office. When needed for filing, the office manager would select these pre-signed cards, affix the appropriate parcel number, date the card, and file in the monthly lottery. Depending on the desirability of a particular parcel, up to 100 different cards might be filed on a parcel; only one card signed by any given individual was filed for any one parcel. In some months, dozens of different parcels were filed on by NRG using this system.

Each entry card had to be accompanied by a ten dollar filing fee. NRG obtained from First Bank Billings a cashier's check, made payable to BLM, for the amount of the filing fees for a particular filer, listing the filer as remitter. Thus, if NRG used cards signed by an employee to file on fifty different parcels in a monthly drawing, a cashier's check in the amount of $500 would be obtained, listing the employee as remitter. On some parcels, individuals filing on behalf of NRG represented in excess of 70% of all cards entered on that parcel. None of the cards ever contained any entry in the blank requesting the identity of any other party having an interest in the offer.

NRG, [PPCM, and WEC] initiated this filing program immediately after commencement of the [PPCM-WEC] joint venture in January, 1975. It continued up until February 1980, at which time BLM abruptly suspended the lottery program. Sixty-three leases were initially acquired by NRG in this fashion, and were subsequently assigned to [WEC and PPCM or PPCM].

In spite of this effort, NRG was not successful in acquiring all the parcels in the Williston Basin that were sought in the

> federal lottery. In some instances, NRG was authorized by [PPCM] and [WEC] to approach the winner of certain parcels with an offer up to 25 dollars an acre, together with a 3% overriding royalty, in an effort to acquire the lease.
>
> The cost to acquire Williston Basin acreage won by individuals filing in the federal lottery for the period January 1975 through September 1979 averaged $4.96 per acre. The cost to acquire Williston Basin acreage that had to be purchased from other parties was considerably higher. For example, as of November, 1978, the cost to [PPCM-WEC] for acquiring leases through the federal filing program averaged $4.63 per acre, while acreage that had to be purchased averaged $13.10 per acre.
>
> Almost without exception, in the five years that the above-described federal filing plan was in operation, every person filing through NRG sold leases they won to NRG, with subsequent partial assignments made to [PPCM and WEC]. Only one NRG employee, Leila Heidema, chose to sell the lease to another oil company. She received $12.50 per acre and a 5% overriding royalty. She was confronted by an NRG principal and the office manager, both of whom told her that she had "betrayed" them. Her office keys were taken from her by the office manager who told her that "we can no longer trust you." She was fired several months later. Following this incident most employees of NRG were not given cards to sign for approximately a year thereafter. When employees were subsequently given cards to sign, they were reminded of Leila Heidema.

The offer of proof ended by listing the 63 parcels acquired by NRG and PPCM pursuant to this filing program, including the 8 parcels at issue here.

The offer of proof thus established that applicants to whom a lease was awarded were not required by written agreement to transfer their leases as directed by NRG or to reimburse it for its efforts in preparing and filing their DEC's. 6/

6/ The absence of any proof that an applicant assisted by NRG was required by written agreement to reimburse NRG from the proceeds of the lease, either in terms of a direct payment from or a commission on any sale of a subsequently acquired lease procured by NRG, distinguishes this case from the long line of cases represented by Raymond G. Albrecht, 92 IBLA 235, 93 I.D. 258 (1986).

On June 14, 1985, PPCM, WEC, and the United States entered into a settlement agreement in order to resolve civil claims of the United States arising from alleged violations of Departmental regulations governing the simultaneous oil and gas leasing system, which violations resulted in the acquisition of noncompetitive oil and gas leases by PPCM and WEC. Under that agreement, PPCM and WEC, without admitting any wrongdoing, agreed to relinquish to the United States any and all interests held either separately or jointly by them in 41 nonproducing noncompetitive oil and gas leases and to pay the United States $3.01 million, as well as unspecified amounts of additional royalties, in connection with 11 producing noncompetitive oil and gas leases, including the 8 leases involved herein. These royalties were to be calculated as if the leases had been issued pursuant to competitive bidding.

In return, PPCM and WEC were allowed to keep the 11 producing leases, and the United States agreed to execute releases in favor of PPCM and WEC, which releases would be effective upon payment of the $3.01 million in full. The United States agreed to release PPCM and WEC from liability and to refrain from instituting any civil or administrative action of any kind against them as to any and all claims that the United States might have in connection with acquisition of any interest in any of the leases. However, the releases further provided:

> [T]his Release shall not release or discharge from liability the NRG Company, any employee of the NRG Company, including Jase O. Norsworthy, James W. Reger, Vincent T. Larsen, Dennis C. Rehrig, and Langdon G. Williams, or the original lessees of the [eleven producing] leases * * *, as to whom the United States expressly reserves its rights.

In its September 1987 decision, BLM stated that, in cancelling the overriding royalty interests, it was acting pursuant to the Secretary's general authority under the Mineral Leasing Act (MLA) recognized in Boesche v. Udall, 373 U.S. 472 (1963). BLM, with the exception of those interests held by Vincent T. Larsen, cancelled "any and all overriding royalty interests [in the subject oil and gas leases] acquired, retained or assigned * * * by the original lessees, the NRG Company, its officers or employees, their heirs, assignees or successors in interest." BLM did so because, based on the criminal investigation, it had determined that such leases and interests were "fraudulently acquired in violation of the multi-filing regulation, 43 CFR 3112.5-2 [(1978)], and the sole party in interest regulation, 43 CFR 3102.7 [(1978)]." In an attachment to the September 1987 BLM decision, BLM identified 13 individuals as the current holders of overriding royalty interests in the subject oil and gas leases.

In addition to cancellation of the overriding royalty interests of 12 of those individuals, BLM required them (or their heirs, successors, or assigns) to repay it "any and all monies" that they had previously received with respect to the cancelled interests. 7/ Finally, BLM stated

7/ Attached to the September 1987 BLM decision is BLM's "best estimate" of the holders of the overriding royalty interests derived from the subject oil and gas leases and the amounts of overriding royalties required to be repaid. These estimated amounts range from $54.96 to $1,106,443.80 and total approximately $5.16 million. BLM stated that a final determination of the parties involved and the amounts due would be made after reviewing information provided by the "operators/payors" regarding the "names [of parties involved] and amounts of all overriding royalties paid [with respect to] the [subject] oil and gas leases." BLM stated that "a date for receipt of repayment and the exact amount of repayment due will be determined as soon as that information is received, and all affected parties will be notified."

that "[t]he recovered monies and the cancelled interests will be offered by competitive sale under the provisions of 43 CFR 3120.1(d)." Ten of the identified holders of cancelled overriding royalty interests appealed from this first decision. 8/

In conjunction with cancellation of the overriding royalty inter-ests and the requirement to repay overriding royalties, by letter dated September 11, 1987, BLM contacted various parties who were either opera-tors of the subject oil and gas leases or payors with respect to the overriding royalty interests cancelled in the September 1987 BLM decision and directed them to immediately place all future overriding royalties accru-ing with respect to the cancelled interests into interest-bearing escrow accounts and to submit, within 60 days of receipt of the letter, a detailed accounting of all overriding royalties already paid to the holders of the overriding royalty interests or their heirs, successors, or assigns. The record indicates that this was done.

On October 20, 1987, apparently as a result of information provided by the operators/payors, BLM issued a decision identifying 16 other individuals (either acting on their own behalf or as trustees) and trusts as "successor holders" of overriding royalty interests cancelled in the September 1987 BLM decision. BLM stated that it regarded such individ-uals and trusts as parties to the September 1987 BLM decision and thereby

8/ The original holders of the individual overriding royalty interests who appealed from the September 1987 decision are: June A. Larsen, Melvin P. Hoiness, Deborah C. Reger, James R. Reger, Karen A. Rintoul, Dorothy Van Wagoner (Lenehan), Jase O. Norsworthy, James W. Reger, Langdon G. Williams, and Dennis C. Rehrig.

also cancelled their overriding royalty interests and required them to repay to BLM any overriding royalties already paid to them. BLM's October 1987 decision generated notices of appeal from the successors to the holders of the cancelled overriding royalty interests. 9/

[1] No appeal was filed by Menno L. Bargen, although the record establishes that a copy of BLM's September 1987 decision was received at his last address of record on September 15, 1987. In the absence of a timely appeal, BLM's decision cancelling Bargen's interest in lease M-32324(ND) became final. 10/ However, BLM's decision was timely appealed insofar as it cancelled other overriding royalties in this lease.

[2] Neither was an appeal filed by June M. Heller (lease M-34187(ND) Acq.). However, the record indicates that there were prob-lems in serving her. BLM first sent a copy of its September 1987 decision to her address in Sun City, Arizona, which was returned with the notation that the addressee had moved and left no address. BLM sent a second copy

9/ The successors to these interests who appealed from the October 1987 decision are: A. G. Bowen, Jr.; Margaret L. Jones; Emily Norsworthy; Margaret Norsworthy, Trustee, Norsworthy Family Trust No. 1; Margaret Reger Trust, First Trust Company of Montana, J. W. Reger-Margaret Reger Trust; J. R. Reger Trust, First Trust Company of Montana, J. W. Reger-J. R. Reger Trust; S. L. Reger Trust, First Trust Company of Montana, J. W. Reger-S. L. Reger Trust; Abbie Reger; Langdon Williams, Trustee; Margaret Ryan Trust, First Trust Co. of Montana, J. Reger-Margaret R. Ryan Trust; Forest Bowen; Theodore Williams, Trustee for David Williams, Michael Williams and Ted Williams; Joyce Williams; Dorothy VanArsdale; and Clinch Gray Norsworthy III.

10/ We note that, in view of our decision reversing BLM's cancellation of the other interests here, BLM may wish to consider whether it would work an injustice not to reconsider its decision concerning Bargen's interest. See Texasgulf, Inc., 114 IBLA 66 (1990), and Walter Van Norman, Jr., 114 IBLA 56, 61 (1990) (Hughes, A.J., concurring).

to the "Trustee of the Heller Revocable Trust," in Phoenix, Arizona, but it was returned for the same reason. A third copy was received by one Betty Hartmann, an apparent stranger to the dispute, on October 19, 1987.

We are left to speculate that Heller, who the record shows was at an advanced age when the lease was issued in 1976, might have died or become institutionalized, and that Hartmann is somehow associated with Heller's estate. In these circumstances, we are unable to conclude that Heller's interests, or those of her heirs, have been protected by providing due notice of BLM's adverse decision. Accordingly, the decision cancelling her interest in lease M-34187(ND) Acq. cannot be considered final. In any event, as discussed below, we conclude that BLM improperly cancelled overriding royalty interests in that lease.

APPLICATION OF DEPARTMENTAL REGULATIONS

Underlying all of the questions presented by these appeals is whether the leases in which appellants hold overriding royalty interests were acquired in violation of applicable Departmental regulations govern-ing the simultaneous oil and gas leasing system.

Departmental Regulations

In its September 1987 decision, BLM stated that the subject leases were acquired in violation of 43 CFR 3112.5-2 (1978) and 43 CFR 3102.7 (1978) in effect at the time the DEC's were filed. Departmental regula-tion 43 CFR 3112.5-2 (1978) provided:

> [W]here an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will * * * be rejected.

Additionally, Departmental regulation 43 CFR 3102.7 (1978), in conjunction with 43 CFR 3112.3-1 (1978), required that an offeror either submit a "signed statement * * * that he is the sole party in interest in the offer and the lease, if issued," or, if he is not the sole party in interest, "set forth the names of the other interested parties." An "interest" in a lease was defined by 43 CFR 3100.0-5 (1978) as including

> [a]ny claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed.

NRG Employees

[3] BLM's conclusion in its September 1987 decision that violations of these regulations occurred is largely based on the joint BLM/Department of Justice investigation and the guilty pleas of NRG and PPCM. 11/ BLM

11/ In the present case, the leases were actually not purchased from the successful drawees by NRG but rather, as arranged by NRG, by either PPCM or PPCM and WEC jointly. Pursuant to an agreement or understanding with NRG, an overriding royalty interest was then assigned to Jase O. Norsworthy and James W. Reger, the principals of NRG, and others. See Letter from NRG to PPCM, dated Dec. 13, 1974 (Exh. 3 attached to SOR of Langdon G. Williams et al.). Thus, PPCM or PPCM and WEC, as well as NRG, could be viewed as having an interest in any lease which might be issued in response to the

also stated that the violations were established both by the provision of the January 1983 plea agreement (leaving BLM free to pursue administrative remedies against NRG or its officers and employees) and by the provision of the June 1985 settlement agreement (actually contained in the attached general releases) that NRG, its employees, and the original lessees of the 8 leases involved herein were not released from liability. These provisions, however, merely constituted a reservation by the United States of its rights to pursue further actions against NRG and others and do not establish that these parties had engaged in any wrongdoing.

First examining the guilty plea, we note that NRG pleaded guilty only to preparing and filing (or causing to be prepared and filed) 12 DEC's on behalf of its employees, which failed to disclose its status as another party in interest. None of the subject drawing entry cards formed the basis for the guilty plea, so that this plea cannot be viewed as an admission by NRG that it had an interest in any of the subject cards. The matter was, therefore, not conclusively determined by the criminal judg-ment. See United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978).

Nevertheless, the guilty plea is strong evidence that NRG did have an interest in the DEC's of its employees. NRG's guilty plea, considered

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fn. 11 (continued)
subject DEC's if the applicants were effectively required to sell their leases through NRG either to PPCM or PPCM and WEC.

In this regard, PPCM also pled guilty to having undisclosed interests in the DEC's filed by NRG on behalf of its employees. United States v. Patrick Petroleum Corp., Crim. No. 83-4-BL6. Thus, the guilty pleas of both NRG and PPCM are equally relevant. However, for simplicity's sake, we shall refer only to the former.

in light of the undisputed evidence contained in other documentation grow-ing out of the criminal investigation, shows that NRG believed that, as a result of the filing method engineered by NRG, it had interests in the cards it prepared and filed (or caused to be prepared and filed) on behalf of its employees. There is no evidence that the circumstances with respect to which NRG pled guilty are any different from the circumstances under which it prepared and filed or caused to be prepared and filed other DEC's for its employees.

The facts determined by BLM's investigation fully corroborate this impression. 12/ The record establishes that both NRG and its employees in whose names the cards were filed fully expected that NRG would arrange for PPCM or PPCM and WEC to purchase any lease issued to them. The evidence well supports the conclusion that the employee/applicants were required by verbal agreement, as a condition of their employment, to sell their leases to parties as directed by NRG under the terms described above. Employee/ applicants had no realistic option of selling their leases to someone other than the purchaser selected by NRG. That is clearly borne out by the instance of an applicant who was assisted by NRG in preparing and filing a DEC and who did not sell her subsequently awarded lease as directed by NRG. That applicant was an employee of NRG who, according to her unchallenged

statement, was harassed and eventually fired under questionable circumstances precisely because she chose not to sell her lease to NRG. See

12/ After reviewing all of the evidence of the investigation proffered in the record, including the Dec. 16, 1987, affidavit of the BLM special agent who participated in the investigation and all attachments to the affidavit submitted with BLM's answer, we agree with BLM's representation that this offer of proof presents a complete picture of the results of that investigation.

Statement of Leila M. Heidema (BLM Answer, Attachment 4 to Putsche Affidavit).

The experience of the fired employee was evidently related to other employees, thus conveying the unspoken but clear message that they too would be fired should they choose not to sell any awarded lease to NRG. The extent to which NRG laid claim to any lease acquired as a result of a DEC prepared and filed by it on behalf of an employee is evident in the following passage from the statement of Leila M. Heidema (BLM's Answer, Attachment 4 to Putsche Affidavit): "I dutifully called Don Jones [NRG office manager] at home [and] told him the good news, 'One of my cards [was] picked,' Don saying, 'You mean one of Norsworthy [and] Reger's cards [was] picked'." (Emphasis in original.)

More directly, the record contains an undisputed statement by Valerie A. Williams that, around May of 1978, the NRG office manager convened a meeting of female employees to reinstitute the filing of DEC's by them. The office manager allegedly advised that if a parcel was won, NRG "expected it because of their investment," presumably in putting up the filing fee and advance rental. Also, the statement of Cynthia C. Curnow, an NRG employee from 1966 to 1973, relating that employees were "allowed to keep" overriding royalty interests, strongly suggests that NRG considered that the employees had no option but to transfer ownership of any leases that they won.

We hold that, in this system of filing DEC's in its employees' names, NRG had created more than an option in an employee/applicant to sell any

lease won to PPCM or PPCM and WEC, but rather a "claim" by it to an advantage or benefit from a lease within the meaning of 43 CFR 3100.0-5 (1978).

Lease M-34446(ND) was won by an NRG employee, Dorothy Van Wagoner. 13/ NRG held an interest in Van Wagoner's DEC that was not disclosed at the time the DEC was filed as required by 43 CFR 3102.7 (1978), in conjunction with 43 CFR 3112.3-1 (1978). Therefore, the DEC should have been rejected. 14/

As discussed below, BLM lacked authority to administratively cancel interests in the lease, even though it was improvidently issued. Nevertheless, our determination that the regulations were violated may be relevant to any subsequent attempts to cancel these interests, either judicially or administratively.

There is some question as to whether Karen A. Rintoul, lease M-39449, was also an employee of NRG at the time her DEC was filed. It appears from one reference in the record that she was (BLM Answer, Exh. 4 at 4), but Rintoul convincingly argues that she was not (Statement of Reasons (SOR) of

13/ Van Wagoner has apparently married, as she has appeared under the name Dorothy Van Wagoner Lenehan.

14/ We note generally that, although BLM cited the multiple-filing regulation, 43 CFR 3112.5-2 (1978), there is nothing in the record conclusively establishing that NRG filed more than one DEC on any of the eight parcels at issue here. There are general indications that NRG routinely made multiple filings. In view of our holding that NRG had an "interest" in its employee's DEC that was not disclosed in violation of 43 CFR 3102.7 (1978), it is unnecessary to consider whether these general indications provide a sufficient factual basis for determining whether a violation of 43 CFR 3112.5-2 (1978) also occurred.

Rintoul at 8). BLM has not rebutted Rintoul's showing on appeal that she was not an employee, and we conclude that she was not.

Nonemployees

[4] Turning to the DEC's of nonemployees of NRG, we note that NRG has never admitted that there was any impropriety with its filing of DEC's on their behalf. As discussed above, its guilty plea was limited to situations involving the filing of DEC's on behalf of its employees, which, we have held, did violate the regulations. Reviewing the other information in the administrative record, we are unable to determine that there was any means by which NRG could force a nonemployee/applicant to transfer a lease as it directed. If there were agreements between NRG and the nonemployee/ applicants under which NRG could seek redress for a recalcitrant applicant, they are not shown in the record. Insofar as there is information in the record, it tends to show the contrary. See SOR of Hoiness at 2-7.

Nevertheless, the fact that all of these leases were assigned in such a manner as to grant identical overriding royalty interests to Norsworthy and Reger, officers of NRG, creates the impression that their DEC's were filed for the undisclosed benefit of NRG, which, as a broker, would participate in the proceeds derived from the lease. In this regard, the Board has held that, where (1) rental is paid by a third party other than the applicant; (2) the applicant used the third party's address on the DEC; (3) the third party corresponded with BLM on the applicant's behalf; and (4) the third party was engaged in seeking to acquire oil and gas leases on

Federal lands, there is a presumption that the DEC was filed for the undisclosed benefit of the third party, and that the mere assertion on appeal by the applicant that the lease would be hers and in her name only is insufficient to overturn BLM's decision rejecting applicant's offer for violating the sole party in interest disclosure requirement. Audrey Jean Boston, 67 IBLA 117, 119 (1982); Lynda Bagley Doye, 65 IBLA 340, 344 (1982).

At most, only two of these circumstances described in Boston and Doye are demonstrated by the record here, in that NRG, which was engaged in seeking to acquire oil and gas leases, paid the rental on some of these leases. Significantly, unlike in those cases, the applicants here used their own addresses on their DEC's, thus ensuring that other parties who wished to purchase any lease that was "won" could contact the applicants directly, without the need to go through NRG. 15/ We do not find that the circumstances here justify a presumption that there was an undisclosed interest.

We do find that the record shows that the method for acquiring leases developed by NRG rested on the fact that the nonemployees enlisted to sign DEC's were friends and relatives of the employees or principals of NRG and,

15/ In 1979, the regulations governing simultaneous noncompetitive leasing were substantially revised, largely to deal with "abuses" of "filing services." See 44 FR 56176 (Sept. 28, 1979). In the preamble to these amendments, the Department noted that "[s]ome services have advanced the first year's rental and obtained leases which have then been assigned without their clients' knowledge." Id. (emphasis added). Changes were made to ensure that applicants would be more directly involved in the process of marketing any leases that they "won."

In this case, the fact that these eight applicants each used an address other than NRG's ostensibly prevented a similar abuse here, as any winning applicant would, at least, have been aware that he or she had "won" a lease and could have been contacted directly by prospective purchasers of the lease.

thus, could be expected to sell any subsequently acquired lease to NRG by ties of loyalty.

We note initially that the filing of DEC's by family members for similar parcels is not, by itself, impermissible. BLM has previously held, with our tacit approval, that nothing in the regulations applicable in 1978 prohibited family members from filing on the same parcels. See Lillian Sweet, 37 IBLA 25, 27 (1978). A limited exception to this rule was announced by the Board, as obiter dictum, in Farrell L. Lines, Trustee, 40 IBLA 91, 96-97 (1979), to the effect that minor children of a family unit have an "interest" in oil and gas lease offers filed by their parents, such that the prohibition against multiple filings would be violated if both the parent and minor child filed applications for the same parcel. 16/ In that case, multiple offers were filed by trustees on behalf of several minor children of a parent, as well as by the parent himself. In the instant case, although at least one child (James R. Reger, son of James W. Reger) filed a DEC, it does not appear that he was a minor, as it was filed in his own name. In the absence of a showing that the children were minors at the time their DEC's were filed, and that DEC's were also filed by their parents on particular parcels, we see no need to consider whether the Lines rule applies here.

The determinative question is whether such claims of loyalty amount to a "claim" to an advantage or benefit from a lease under 43 CFR 3100.0-5

16/ The Board held that the trust arrangement for the minor children gave a contingent remainder interest to the parents that was sufficient to qualify as an "interest." Thus, the Board's observation that the general concern of a minor child in the relative wealth or interest of his family constituted a "beneficial interest" that must be disclosed stands as dictum.

(1978), or merely a hope or expectancy that the applicant would sell the lease to NRG. A hope or expectation does not amount to an interest in a lease within the meaning of 43 CFR 3100.0-5 (1978), even where the filing service selects the parcel, submits the DEC, and pays the filing fee and first year's rental. D. E. Pack, 30 IBLA 230, 232-33 (1977); John V. Steffens, 74 I.D. 46, 53 (1967). The following excerpt from Steffens is illustrative of the rationale for concluding that the filing service does not have an interest in a potential lease in such circumstances:

> The most that Central Southwest obtained under the arrangement, as far as the record shows, was a calculated likelihood that a successful client would feel a sense of duty to give Central Southwest the first opportunity to obtain an assignment of a lease which, coupled with Central Southwest's direct means of communication with the client, would give it a practical advan-tage over competitors in securing an interest in the client's lease. Undoubtedly, Central Southwest could bring an action to recover the amount of the rental payment advanced to a client, but we see no basis upon which it could successfully assert a claim of interest in a lease in the event a client elected not to accept its offer to purchase the lease. Thus, while we recognize the advantage obtained by Central Southwest, we are unable to conclude that this expectancy constitutes an "interest" within the meaning of 43 CFR 3100.0-5(a).

74 I.D. at 53.

The question remains, if the successful nonemployee/applicants were not forced to sell their leases to NRG, why did they do so, when they could possibly have sold them to other parties on more favorable terms? 17/ In this regard, we find the circumstances surrounding June M. Heller's

17/ We accept for the sake of argument the general statement in the offer of proof that other parties offered the applicants more favorable terms for their lease interests.

participation instructive. Mrs. Heller, the octogenarian grandmother of the wife of an NRG employee, signed DEC's for NRG whenever she was visiting her daughter in California (who also had evidently been enlisted to sign cards for filing by NRG). When asked by a Government investigator why she did not negotiate the assignment terms before assigning her lease to NRG, she stated that she regarded the lease as a "gift," because "it didn't cost her anything." While Mrs. Heller seems to have been guided by a sense of gratitude toward NRG, there was nothing preventing her from promoting the sale of the lease on her own. What could NRG have done to force Mrs. Heller to do its bidding on the lease? There is nothing to show that there was any agreement between them, or between NRG and any other nonemployee. While it is arguably likely that Mrs. Heller was guided by a sense of loyalty to her granddaughter and that she would have been swayed by a threat to the employment of her granddaughter's spouse, it is equally possible that she would not.

We regard this sense of moral obligation as too imprecise and amorphous to be counted as an "interest," as that term is defined in the applicable regulation. We see NRG's decision to put up money for nonemployees under these circumstances as a gamble on the possibility that feelings of gratitude and loyalty would overcome more pragmatic considerations. While this gamble evidently paid off repeatedly, admittedly resulting in an "advantage" for NRG, we are unable to conclude that tak-ing it amounted to a violation of Departmental regulations. See John V. Steffens, supra at 53.

Additionally, we note, as to the DEC of Melvin P. Hoiness, that his uncontradicted statement convinces us that he was not bound by any pre-existing agreement to convey lease M-32760 as directed by NRG. To the contrary, the record shows that Hoiness made a conscious decision to assign his lease to NRG, after he had won the lease and after considering a competing offer to purchase. Hoiness indicated that, instead of attempting to assert any rights in acquiring the lease, NRG left the decision up to him.

BLM argues on appeal that the present case is similar to H. J. Enevoldsen, 44 IBLA 70, 86 I.D. 643 (1979), aff'd, Enevoldsen v. Andrus, Civ. No. 80-0047B (D. Wyo. June 24, 1981), wherein the Board concluded that a third party, which had prepared and filed DEC's on behalf of others, had an interest in any subsequently issued lease because there was a verbal agreement that the third party would have either the "first opportunity to make an offer to purchase the lease [from the applicant]," commonly known as the first right to buy, or the "right to match any other offer made by a third person to [the applicant]," commonly known as the right of first refusal. Id. at 90, 86 I.D. at 653. We concluded that such a right, enforceable against the applicant, was a prospective "claim" to an advan-tage or benefit from a lease, and was therefore an "interest" within the meaning of 43 CFR 3100.0-5 (1978). Although the applicant could chose not to sell, should he decide to do so, he was required first to allow the third party either to offer to purchase the lease or to match another offer for the lease. This arrangement, we held, created an "interest" in any subsequently acquired lease, which interest was required to be disclosed.

However, in concluding that either a first right to buy or a right of first refusal constituted an interest in a lease under Departmental regulations, we expressly distinguished an "option in the lessee to sell to the agent filing service," stating:

> In [the latter] situation, there is no restraint on alienation of the lease. The lessee may sell to anyone and the agent has no claim against him if he chooses to sell to someone else, without exercising the option to sell to the agent. Under * * * a right of first refusal * * *, however, the lessee is restricted in his rights to the lease because he cannot alienate any interest in the lease without complying first with his arrangement with [the agent filing service].

Id. Unlike Enevoldsen, there is no evidence that the present case involved an agreement establishing either a first right to buy or a right of first refusal.

In these circumstances, we cannot determine that prelease violations of either 43 CFR 3102.7 (1978) (requiring disclosure of other parties in interest) or 43 CFR 3112.5-2 (1978) (prohibiting multiple filing of DEC's by an agent or broker under an agreement allowing him to participate in the proceeds of any lease issued) occurred as to the DEC's of nonemployees of NRG. Neither NRG nor PPCM had a cognizable "interest" in the DEC's of nonemployees of NRG, as there were no enforceable agreements with nonemployees allowing NRG or PPCM to participate in the proceeds of leases issued to them. Accordingly, we reverse BLM's decisions to the extent that DEC's were filed by parties who were not employees of NRG.

Apart from the lease held by Van Wagoner (Lenehan), the leases involved herein were issued to nonemployees of NRG. Accordingly, BLM's decisions

as to the following leases are hereby reversed: M-32760(ND) Acq. (Melvin P. Hoiness); M-32753 (ND) Acq. (June A. Larsen); M-34187(ND) Acq. (June M. Heller); M-37404 (SD) (James R. Reger); M-34449(ND) Acq. (Deborah C. Reger); and M-39449 (Karen A. Rintoul). BLM's decision concerning lease M-32324 (ND) (Menno L. Bargen) is reversed insofar as it cancelled inter-ests held by Norsworthy, Reger, and Williams.

We hold below that BLM lacked authority to administratively cancel these leases. However, the issue of the validity of the DEC's is nevertheless significant, as it is possible that BLM might seek judicial cancellation or attempt to justify administrative cancellation under the 1988 regulations. As the obtaining of the above leases involved no cognizable pre-lease improprieties established by the present record, BLM may not pursue cancellation as to these interests.

ADMINISTRATIVE CANCELLATION OF OVERRIDING ROYALTY INTERESTS

[5] Appellants challenge BLM's authority to cancel their overriding royalty interests. In doing so, BLM relied on Boesche v. Udall, supra, in which the Supreme Court considered the question of whether the Secretary of the Interior had the authority to administratively cancel a "lease of public lands issued under the provisions of the Mineral Leasing Act * * * in circumstances where such lease was granted in violation of the Act and regulations promulgated thereunder." Id. at 473. The Court concluded that, "under his general powers of management over the public lands," the Secretary has traditionally possessed the authority to administratively cancel a lease "for invalidity at its inception," i.e., where a breach of the Act or its implementing regulations occurred prior to issuance of the

lease, and that this authority was not withdrawn by the MLA, either as originally enacted or as subsequently amended. Id. at 476.

Boesche concerned a nonproducing lease, and the Supreme Court was careful to note that it sanctioned "no broader rule than is called for by the exigencies of the general situation and the circumstances of this particular case." Id. at 485. Nevertheless, Boesche may be read as suggest-ing that the Department has broad administrative authority to cancel MLA leases for pre-lease violations without regard to whether the lease is in production. BLM was evidently guided by such reading in reaching its decision in the instant appeal.

However, this Board has consistently held that, whatever the Secretary's inherent authority might be, the Secretary has restricted that authority by promulgating a regulation that requires the initiation of judicial proceedings to cancel a producing lease. E.g., James W. Smith, 6 IBLA 318, 79 I.D. 439 (1972); Naartex Consulting Corp., 48 IBLA 166 (1980), appeal dismissed, Naartex Consulting Corp. v. Watt, 542 F. Supp. 1196 (D.D.C. 1982), aff'd, 722 F.2d 779 (D.C. Cir. 1983), cert. denied, 467 U.S. 1210 (1984); Suzanne Walsh, 98 IBLA 363 (1987). Smith and its progeny held that the Department, through its regulations, had interpreted section 27(h)(1) of the MLA, 30 U.S.C. § 184(h)(1) (1982), to require judicial action to cancel any interest in a lease in production, regardless of whether the underlying violation was pre- or post-lease. 18/

18/ By so doing, the Board itself elected to read section 27(h)(1) to apply to any violation of the MLA, rather than (as suggested by the Supreme Court in Boesche, supra at 480) merely to any violation of the acreage limitation provisions of section 27. See James W. Smith, supra at 323, 79 I.D. at 442. As discussed below, BLM has also read section 27(h)(1) to

Indeed, Departmental regulations have consistently left no room to doubt that judicial action is required to cancel a producing lease. For example, 43 CFR 3108.3 (1972), considered by the Board in Smith, supra at 324, 79 I.D. at 442, provided: "Judicial Proceedings. Leases known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the Act." (Emphasis added.) No distinction between pre- or post-lease violations could be discerned from this regulation, either from its express terms or by implication. The Board, holding that it was bound to follow this regulation, declined in Smith to sanction administrative cancellation of any producing oil and gas lease.

The cancellation regulation was amended on May 23, 1980, 45 FR 35163, but it was recodified virtually verbatim as 43 CFR 3108.3(b) (1981): A" lease known to contain valuable deposits of oil or gas may be canceled only by judicial proceedings in the manner provided in sections 27 and 31 of the Act." Again, there was no doubt that judicial action was necessary to cancel a producing lease.

The cancellation regulation was amended and expanded again on July 22, 1983, 48 FR 33662. As codified, the amended regulation contained three subsections, 43 CFR 3108.3(a) through (c) (1984). Subsection 3108.3(a)

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fn. 18 (continued)
apply to all violations of the MLA: "The final rulemaking has, therefore,
been revised by adding * * * a separate paragraph setting out the judicial cancellation and divestiture authority in section 27(h)(1) of [the MLA], for interests held in violation of the Act [MLA]." 53 FR 22823 (June 17, 1988) (emphasis supplied).

contained language relating to section 31 of the MLA authorizing cancellation for post-lease violations, both administratively and judicially, depending on whether the lands covered by the lease were known to contain valuable deposits of oil or gas. Subsection 3108.3(b) contained a broad statement that "[l]eases shall be subject to cancellation if improperly issued," giving the impression that leases could be generally cancelled by the Department for improprieties in issuance (including pre-lease violations). However, this impression was countered by subsection 3108.3(c), which repeated the old rule that "[l]eases for lands known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the Act." The language of subsection 3108.3(c) was identical to that previously construed in Smith as limiting Departmental authority to administratively cancel producing leases.

Despite the inclusion of the more liberal 43 CFR 3108.3(b) (1984), in Suzanne Walsh, supra, we expressly held that subsection 43 CFR 3108.3(c) (1984) continued the prohibition against administrative cancellation of producing oil and gas leases, including those leases not in production but merely covering lands known to contain valuable deposits of oil or

gas:

> In James W. Smith, the Board concluded en banc that this regulation, which is longstanding, constitutes an administratively imposed limitation on the Secretary's traditional authority to cancel oil and gas leases which were improvidently issued, and that the Department is bound by that regulation. Thus, the Department cannot administratively cancel appellant's lease even though it covers land which is not subject to Federal oil and gas leasing if it is determined that the lands leased are

"known to contain valuable deposits of oil or gas." [Citations omitted.]

98 IBLA at 371. In Walsh we remanded the case to BLM with instructions to refer the matter to the Department of Justice for initiation of judicial proceedings to cancel the lease.

It is the 1983 version of the cancellation regulation that was in effect in 1987 when BLM issued these decisions. 43 CFR 3108.3 (1987). It is undisputed that all the leases involved in the case are producing leases. Based on the Board precedents discussed above, there is no doubt that, at the time its decisions were issued, BLM lacked authority to cancel these leases administratively. Accordingly, its decisions must be reversed in toto for this reason.

BLM attempts to deflect the applicability of 43 CFR 3108.3(c) (1987), requiring judicial cancellation, by arguing that this section applies only to "leases" rather than "interests in leases." We do not believe that such a distinction can be made. Even though 43 CFR 3108.3(c) speaks of "leases" being cancelled, the reference in the regulations to section 27 of the MLA necessitates the conclusion that the regulation also encompasses "interests in leases." Section 27(h)(1) of the MLA provides for an election where an interest in a lease is owned or controlled in violation of any of the provisions of the MLA: the lease may be cancelled, the interests forfeited, or the person owning the interest may be compelled to dispose of the interest, "in any appropriate proceeding instituted by the Attorney General." Therefore, where a regulation provides that a lease may be cancelled only by

judicial proceedings in the manner provided in section 27, the option of cancellation of the lease, forfeiture of the interest, or compelling disposition of the interest is available to the Attorney General. Thus, 43 CFR 3108.3(c) (1987), like section 27, addresses cancellation of both leases and interests in leases.

We are not unmindful that the cancellation regulation was amended in 1988, following issuance of BLM's decisions here. 53 FR 22822 (June 17, 1988). 19/ At that time, BLM announced its intention to reconsider the general question of the Department's authority to cancel leases administratively:

> As a result of [BLM's] review of the comments on [the cancellation provisions] and a review of the language of the proposed rulemaking and the cancellation provisions of the law, it has been determined that the proposed rulemaking did not clearly implement the [Department's] oil and gas lease cancellation authority. The final rulemaking has, therefore, been revised by adding a separate paragraph setting out the authority in section 31(b) of the [MLA] for breach of the lease, another paragraph setting out the judicial cancellation authority in section 31(a) of the [MLA] for breach of the lease, and a separate paragraph setting out the judicial authority in section 27(h)(1) of [the MLA] for interests held in violation of the Act.

19/ Section 5104 of the Reform Act, P.L. 100-203, 101 Stat. 1330-259 (1987), amended section 31 of the MLA to clarify when the Department could cancel a lease for post-lease violations without instituting judicial proceedings. Specifically, section 5104 provides that this authority exists "unless or until the leasehold contains a well capable of production of oil or gas in paying quantities, or [unless and until] the lease is committed to an approved cooperative or unit plan or communitization agreement." This section merely clarified section 31 of the MLA, which had provided more broadly that the Secretary's authority to cancel a lease for post-lease violations existed "unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas." The 1988 amendment of 43 CFR 3108.3 (1978) added the Reform Act's clarification that cancellation for post-lease violations could not be accomplished administratively when either actual or allotted production had occurred previously. 53 FR 22822 (June 17, 1988).

53 FR 22823 (June 17, 1988). BLM has not had an opportunity to address how these changes affect its authority to cancel leases administratively. 20/ Thus, the interests of efficient adjudication would best be served if BLM makes the initial determination on this question, and, on remand, it is free to consider the question of whether interests in lease M-34446(ND) may be cancelled administratively. Any adverse decision would, of course, be subject to appeal.

In view of our reversal of BLM's decisions, it is unnecessary to address other questions that may signficantly affect the outcome of any subsequent proceeding. These questions are best addressed in the context of a specific appeal from any future adverse decision.

20/ We note that, far from liberalizing BLM's cancellation authority to include producing leases, 43 CFR 3108.3(c) (1988) has been changed in a way which calls into question BLM's authority to administratively cancel any lease (producing or nonproducing). This provision now effectively states, "If any interest in any lease is owned or controlled * * * in violation of any of the provisions of the act, the lease may be canceled * * * only by judicial proceedings in the manner provided by section 27(h)(1) of the [MLA]." No mention is made of whether the lease is in production or is known to contain valuable deposits of oil or gas. This provision thus plainly appears to limit BLM's authority to cancel leases for any viola-tion of the MLA to judicial proceedings, regardless of whether the lease is in production. We note that the regulation is more restrictive than the statute in that the statute states that action may be taken in any appropriate proceeding instituted by the Attorney General, while the regulation states that action may only be taken by judicial proceedings.

This action is possibly explained if one reads section 27(h)(1) as applying only to acreage limitations, as suggested by the Supreme Court in Boesche, supra at 480. However, both the Board (James W. Smith, supra at 323 n.4, 79 I.D. at 442 n.4) and BLM (preamble to 1988 rulemaking, 53 FR 22823 (June 17, 1988)) have rejected this narrow reading of the statute.

Nor would the cancellation authority apparently be saved by the inclusion of the more liberal 43 CFR 3108.3(d) (1988), stating "[l]eases shall be subject to cancellation if improperly issued." As discussed above, in Suzanne Walsh, supra, we expressly held that subsection 43 CFR 3108.3(c) (1984) continued the prohibition against administrative cancellation of producing oil and gas leases, notwithstanding the presence of 43 CFR 3108.3(d) (1988) (then codified as 43 CFR 3108.3(b) (1984)). As noted above, the applicability of 43 CFR 3108.3(c) has been significantly expanded by the 1988 rulemaking.

ATTORNEY'S FEES AND EXPENSES

[6] Appellants contend that they are entitled to recover attor-neys' fees and expenses incurred by them in order to maintain the instant appeals, pursuant to section 203(a)(1) of the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (Supp. IV 1986).

Section 203(a)(1) of the EAJA provides for the award of attorneys' fees and expenses to the prevailing party in an "adversary adjudication" except where the position of the agency was substantially justified or special circumstances make an award unjust. 5 U.S.C. § 505 (Supp. IV 1986). However, despite the fact that appellants are prevailing parties in this case, it is clear they are not entitled to recover attorneys' fees and expenses under any circumstances. As construed by the Board, section 203(a)(1) of the EAJA is only applicable in the case of adjudications "required by statute [5 U.S.C. § 554 (1982)] to be determined on the record after opportunity for an agency hearing." BLM v. Ericsson, 98 IBLA 258, 261-62 (1987); see Cavin v. United States, 19 Cl. Ct. 198 (1989). The present proceeding falls within the purview of the MLA and the Mineral Leasing Act for Acquired Lands. Nothing in those Acts requires that administrative adjudication under the Acts be conducted on the record after opportunity for a hearing. Thus, we conclude that appellants are not entitled to recover attorneys' fees and expenses and hereby deny their requests.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions

appealed from are reversed, and appellants' requests for attorneys' fees are denied.

_____

David L. Hughes
Administrative Judge

I concur:

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Bruce R. Harris
Administrative Judge

APPENDIX A

Oil and Gas Lease	Original Lessee	Holders of Overriding Royalty Interests	Percentage Amounts of Overriding Royalty Interests
M-32324(ND)	Menno L. Bargen	Menno L. Bargen	1.000%
		Jase O. Norsworthy	1.25
		James W. Reger	1.25
		Langdon G. Williams	1.25
		Vincent T. Larsen	1.25
M-32753(ND)Acq.	June A. Larsen	June A. Larsen	1.000
		Jase O. Norsworthy	1.25
		James W. Reger	1.25
		Langdon G. Williams	1.25
		Vincent T. Larsen	1.25
M-32760(ND)Acq.	Melvin P. Hoiness	Melvin P. Hoiness	1.000
		Jase O. Norsworthy	1.125
		James W. Reger	1.125
		Langdon G. Williams	1.125
		Vincent T. Larsen	1.125
		Dennis C. Rehrig	.5

Oil and Gas Lease	Original Lessee	Holders of Overriding Royalty Interests	Percentage Overriding Royalty Interests
M-34187(ND)Acq.	June M. Heller	June M. Heller	1.000
		Jase O. Norsworthy	1.25
		James W. Reger	1.25
		Langdon G. Williams	1.25
		Vincent T. Larsen	1.25
M-34446(ND)Acq.	Dorothy Van Wagoner Lenehan	Dorothy Van Wagoner	1.000
		Jase O. Norsworthy	1.125
		James W. Reger	1.125
		Langdon G. Williams	1.125
		Vincent T. Larsen	1.125
		Dennis C. Rehrig	.5
M-34449(ND)Acq.	Deborah C. Reger	Deborah C. Reger	1.000
		Jase O. Norsworthy	1.25
		James W. Reger	1.25
		Langdon G. Williams	1.25
		Vincent T. Larsen	1.25

Oil and Gas Lease	Original Lessee	Holders of Overriding Royalty Interests	Percentage Amounts of Overriding Royalty Interests
M-37404(SD)	James R. Reger	James R. Reger	1.000
		Jase O. Norsworthy	1.25
		James W. Reger	1.25
		Langdon G. Williams	1.25
		Vincent T. Larsen	1.25
M-39449	Karen A. Rintoul	Karen A. Rintoul	1.000
		Jase O. Norsworthy	1.125
		James W. Reger	1.125
		Langdon G. Williams	1.125
		Vincent T. Larsen	1.125
		Dennis C. Rehrig	.5